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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 493

LEO PETER REISTROFFER, W. L. ROGERS and MARVIN NORRIS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in this case on July 29, 1958.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, pp. 23-54) is reported at 258 F. 2d 379.

JURISDICTION.

The judgments of the Court of Appeals were entered on July 29, 1958 (Appendix, infra, pp. 55-57). A timely petition for rehearing was filed, and this petition was overruled on September 11, 1958. An order of October 2, 1958, by Mr. Justice Whittaker, extended the time for filing petition for

certiorari to and including November 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether, in a lengthy case involving seven defendants alleged to have participated in a scheme to defraud, the trial court, if requested, must state to the jury the tests governing admissibility of acts and declarations against each alleged participant rather than pass this question of admissibility along to the jury for their determination at the conclusion of the case.

2. Whether a defendant in a criminal case is entitled to a theory of defense instruction and it is insufficient to merely charge the jury that a not guilty plea has been entered and the burden of proof was on the government beyond a reasonable doubt.

3. Whether declarations of one alleged participant made after the completion of an alleged scheme to defraud are admissible against the other alleged participants.

4. Whether the action of the trial court in stating that witnesses called by one defendant were not regarded by the court for cross-examination by other defendants constituted a denial of the right of cross-examination.

5. Whether the refusal of the application of an indigent defendant for the appointment and subpoening of an expert handwriting witness and a jury argument of the government that this defendant could have subpoenaed any witness, expert or otherwise, in a case where expert testimony that this defendant's handwriting was not on certain documents was necessary to establish his innocence constituted a denial of his right to have compulsory process in his favor and his right to due process of law under the Sixth and Fifth Amendments, respectively, and was otherwise erroneous.

STATUTES AND RULES INVOLVED.

18 U. S. C., § 1341, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both.

Federal Rules of Criminal Procedure:

Rule 17 (b) provides:

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant

cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

Rule 28 provides:

Expert witnesses.

The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

STATEMENT.

Petitioners were convicted in the United States District Court for the Northern District of Iowa under a thirty-five count indictment, charging violations of the mail fraud statute, 18 U. S. C. 1341. Petitioners Reistroffer and Rogers were convicted under twenty-six counts and sentenced to five years imprisonment for each offense, the sentences to run concurrently (R. 977-979). Petitioner Norris was convicted under four counts and sentenced to one year imprisonment for each offense, the sentences to run concurrently (R. 980-981). The charge was that from October 25, 1948, to January 22, 1954, petitioners and four others devised a scheme to defraud and for obtaining money by means of false and fraudulent representation from various named persons and others who would be induced by defendants to purchase coin-operated vending machines and products to be sold and dispensed therefrom, and that for the purpose of executing the scheme did mail, in each conviction count except Count 35, a letter from the National Advanced Vending Company to a named addressee between February 2, 1952, and August 2, 1952 (R. 1-24), and in Count 35, a letter from the Continental Merchandising Corporation dated January 30, 1954 (R. 28).

The evidence offered by the Government may be summarized as follows: The case involved the activities of three businesses, the Bru Coffee Company which manufactured instant coffee, the National Advanced Vending Company which sold vending machines which dispensed gum, nuts, candy and coffee and the Continental Merchandising Company which sold coffee vending machines and chlorophyll pellets to be dispensed from vending machines. Reistroffer and Rogers were partners in the Bru Coffee Company which sold coffee franchises from April until November, 1951 (R. 137-138, 142). This company was unsuccessful in removing sediment from the instant coffee

that it manufactured. Norris had no connection with this company. Reistroffer was the owner of the National Advanced Vending Company (R. 658), Rogers had the title of its sales director (R. 53) and Norris was identified as a distributor or salesman by two vending machine purchasers (R. 508, 513). This company quit business in December, 1952 (R. 53, 166). The Continental Merchandising Company was formed in May, 1952, by an attorney and former mayor of Dubuque, Iowa (R. 51-52), who in September, 1952, sold his stock to one Underwood, who agreed at that time to give Rogers two-thirds of its gross profits (R. 676, 677-680). In August or September, 1953, Rogers sold part of his interest to Reistroffer and the balance to the company (R. 685). Reistroffer was also in Continental's offices regularly but Underwood never saw Rogers after September, 1952 (R. 683). Norris again had no connection with Continental.

Before 1952 National sold vending machines which dispensed gum, nuts and candy, and bought its machines from the Silver King Manufacturing Company, a well established manufacturer of vending machines (R. 621-622). In 1952, National primarily sold a coffee vending machine which it requested Silver King to develop in December, 1950 (R. 613). Silver King built several models during 1951 and eventually contracted with National in January or February, 1952, to make 2,500 machines (R. 614, 615). It was to manufacture the cabinet, purchase components from other suppliers and assemble the machine at its factory. It ordered parts for 500 machines. The normal production period was two months and another month was required for the securing of raw materials. Silver King estimated that it could produce 200 machines a month and informed Reistroffer that it would take two or three months "to get going" (R. 615, 617). After signing the contract Silver King had difficulty in securing adequate parts. The first shipment of wafer tanks was defective.

and although there were several suppliers of such tanks it took three months to obtain a usable tank. Similar difficulties were experienced with stainless steel valves (R. 616). In June, 1952, when the production line was set up and moving there were 250 orders on hand (R. 617, 639). National initially sent in money for its complete order to $60,000.00 and then put money for the balance of its order in escrow allowing Silver King to draw against this account as the machines were completed (R. 618). National always sent in money for the machines immediately after receiving payments from its purchasers (R. 79, 632-637).

The coffee vending machines were sold to purchasers by persons known as distributors who made oral representations concerning the machines and the locations where the machines were to be placed. In the conviction counts, Rogers made five of the sales involved (R. 362, 368, 377, 401, 434) and Norris was identified as the seller in one count (R. 507).

National gave its distributors sales manuals instructing that any advertisements placed should not contain any misleading statements (R. 54), and that if locations were promised they should be adequate (R. 67-68, 71-72).

Advertisements similar in nature were used in connection with the sales which stated that $200.00 to $400.00 a week was possible part time and requesting answers by persons who wished to enter business immediately (R. 149, 234, 247, 283, 289, 304, 325, 336, 378, 381, 401, 472, 543, 584, 601). Some of the advertisements were placed by an advertising agency operated by Reistroffer's sister-in-law and there was evidence that Reistroffer had filed the trade name when this company was organized (R. 51, 599-601, 700). The distributors began selling machines in January, 1952. Upon making a sale the salesman and purchaser would sign a form purchase order which gave National six months to deliver and stated in bold face type that the

written order was complete in itself and that no representation other than set forth in the purchase order formed the basis of any reliance by the purchasers (R. 85-87, 331, 339, 352, 365, 372, 378, 382, 394, 401, 407, 415, 422, 446, 455, 460, 471, 474, 480, 488, 493, 509, 524, 530, 581). The distributors would also agree to personally secure locations for the machines (R. 87).

In connection with the sale of these machines, twenty-three distributors or salesmen made various representations as to delivery date, earnings, supervision and locations. Salesmen promised early delivery and suggested ignoring the six-months delivery provision in the purchase order (R. 151, 157, 169, 192, 205, 219, 232, 242, 248, 258, 283). Satisfactory locations were promised and not secured (R. 149-152, 190-194, 200-201, 246-248, 258-265, 279-286, 401-404, 459-463, 513-520, 521-525, 709-715). The salesmen left as soon as they made the sale and received the money. Upon receipt of an order National would send out a form letter advising the purchaser that there would be a delay in shipment of six to eight weeks because of the delay in the water tanks in the coffee vender (R. 151, 331, 339). A different form letter which did not mention delay was used when the purchaser did not pay the full purchase price with the order (R. 260). These letters were either signed by Reistroffer or by an office employee as were answers to any purchaser's complaints. The company answered all complaints and correspondence from the customers and shipped the coffee machines ordered prior to the expiration of the six-month period. None of the purchasers obtained the earnings promised by the salesmen and none testified as to any substantial profit from the machines.

On December 17, 1952, Reistroffer told a postal inspector that most salesmen had been advised that deliveries would be delayed and that the delays were due to the failure of the suppliers (R. 657-661).

Petitioner Norris was represented at the trial and on appeal by counsel appointed for him as an indigent defendant. His attorney appointed to represent him in the Court of Appeals is voluntarily assisting him in his efforts to secure relief in this Court. Reistroffer and Rogers are allowing Norris to join in this joint petition at no expense to Norris.

The evidence concerning the participation by Norris in the sale of vending machines as a salesman was confined to the period March 6, 1952, to June 25, 1952, and was related to National. The four counts under which he was convicted involved letters whose mailing dates were February 2, April 10, May 6, and July 5, 1952 (R. 1-11, 16-17, 18-19, 22-23). Norris's name was also used by co-defendant Kenneth Paul Brown in making sales between March 10, 1952, and August 11, 1952 (R. 203, 214, 229, 315, 336, 350, 357, 443, 455). Norris was only identified as the salesman on one of the four counts under which he was convicted which involved a sale to one Ruth Dobson which was consummated in her attorney's office on June 26, 1952. Mrs. Dobson said she saw him sign the purchase order for the machine (R. 508-512). Norris was also identified as accompanying Brown to a purchaser's home on March 6, 1952 (R. 579). Another purchaser claimed he spoke to him in a hotel lobby after buying some machines (R. 206). The witness L. P. Leid testified that on June 6, 1952 he bought some coffee vending machines from Norris (R. 513-514) and that Norris also signed the purchase order for the machines in his presence (R. 520). Both of the purchase orders which allegedly contained Norris's handwriting were introduced into evidence.

Evidence adduced by Norris tended to prove an alibi for part of the time when he was supposed to have been selling the machines. His evidence showed that from May 1952 through August 1952 he was in Big Springs, Texas, far re-

moved from the vicinity of any of these sales (R. 765-766, 804-805). The attorney for Ruth Dobson also testified that the man who sold her the machines was not petitioner Norris but that he resembled his co-defendant Brown (R. 764-765). Norris requested the Trial Court to issue a subpoena at Government expense for an expert witness to testify that the handwriting on the two purchase orders was not his handwriting (R. 568). The trial judge denied the request stating (R. 609), "Well, I certainly would favor having a handwriting expert, I think it would be in the administration of justice, but, I don't know how to provide for it" and "I think it is one of those situations where you just can't provide expert services for indigent defendants." The court also said (R. 606), "I have no way of compelling any expert witnesses to do any preparation of any kind at all. You can put a subpoena on anybody and bring him here, but it is my experience handwriting experts will not testify to a signature unless they have had a chance to test the handwriting in a laboratory." Further remarks were (R. 607): "We have no provision for paying any expert fees that I know of." Six affidavits had been filed and sworn to by Norris before his court appointed attorney (R. 567, 568, S. R. 1, Original papers relative to the subpoenaing of witnesses William, Cryer and Lundin).

In closing argument to the jury, after counsel for Norris argued that the Government failed to produce any handwriting experts (R. 874), the Prosecutor in turn argued that Norris had the privilege of calling such experts and that "Mr. Norris had the privilege of putting any witness within the reach of a subpoena in the United States on the stand, expert or otherwise" (R. 897-898). The Trial Court, in response to objections on a motion for a mistrial directed at this argument of the prosecution, told the jury to disregard the argument relative to handwriting on both sides and denied Norris' motion for a mistrial (R. 898-900).

REASONS FOR GRANTING THE WRIT.

1. In each of the 59 instances where the Government produced a witness to testify to the sale of vending machines by salesmen, objection was made to the sales talk, that the talk was hearsay as to the defendants on trial and that if it be admitted, a limiting instruction should be immediately given to the effect that the jury should not consider it against the defendants not present at the sale unless the scheme to defraud was proved as charged and that the sales talk was in furtherance of a scheme.[1] Similar requests were made in regard to letters from the various purchasers and to other declarations.[2] These requests were denied on the assurance of the government that the testimony would be connected up. The trial judge in his charge at the close of the three week trial passed the question of admissibility of these acts and declarations to the jury for their determination. The representations in these sales talks, contradicting the terms of the written purchase orders, were the principal basis of the fraud alleged. The jury, while required to determine the admissibility of this evidence, was given no standard or basis for considering this issue until a time when it was difficult for them to make such a decision. The trial court should have stated the tests governing admissibility of such declarations at the time of their introduction. It was not sufficient to wait until the conclusion of the case because it is doubtful if any instruction could be given at that late time which would have dissipated the harmful effects of admitting it without limitation.

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[1] R. 82, 89, 105, 120, 127, 137-142, 149-150, 156, 168, 171, 186, 190, 200, 206, 214, 242, 247, 270, 280, 287-288, 297, 316, 323, 329-330, 336, 350, 357, 362, 368-369, 394, 401, 413, 418, 435, 459, 473, 479, 487, 492, 507-508, 522, 527-528, 576, 595, 701, 710, 717, 737.

[2] R. 173-174, 176, 177-180, 233-235, 249-250, 283-285, 305-315, 327, 328, 384-391, 371-372, 338-348, 410, 358-359, 436-442, 330, 334-335, 427-430, 451-453, 462, 539, 547-551, 481-482, 516-519, 703-707, 711-715, 702-708, 717-718, 739-746, 747, 752, 681, 686-695, 751.

Declarations of one conspirator may be used against other conspirators not present on the theory that the declarant is the agent of the other, but such declarations can be used against co-conspirators only when made in furtherance of a conspiracy. **Lutwak v. United States**, 344 U. S. 604, 617-619. In that case the Court also said that relevant declarations of a conspirator made in the absence of his co-conspirators and not in furtherance of the conspiracy may be also admissible as against the declarant, but that the Court "must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only," and "these declarations must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limits put upon them." While the **Lutwak** case held declarations made after the conclusion of the conspiracy admissible against the declarant alone the basic principle there involved should also be applicable here. When evidence is admitted conditional only on a jury finding that the declarant is the agent of others and that such declarations were made in furtherance of a conspiracy or scheme, the trial judge should make clear at the time of its admission, the defendant against whom the evidence is admitted unconditionally, the defendant against whom the evidence is admitted conditionally, and the conditions under which the jury may consider it against these other defendants. The jury should have been instructed at the time these conversations were admitted that any statements of salesmen to purchasers were admissible against petitioner Reistroffer if the distributors were agents of Reistroffer and were acting in the scope of their authority. Certainly the statements in the purchase orders relative to National being allowed a six-month delivery date, and that the purchasers were not relying on oral representations created an issue as to whether the representations were in the scope of the authority of the salesmen. The jury should also have been instructed,

in effect, that Rogers was not responsible for statements made by other salesmen except if they found Rogers and the declarant were part of the same scheme and the conversations took place while both were part of the scheme. And Norris should not have been held responsible for statements before and after the short period his name is identified in the record. Furthermore, in admitting this evidence against him the trial judge overlooked the fact that there was no testimony connecting Norris to the Continental Merchandising Company or the Bru Coffee Company. Therefore, this testimony should not have been considered against Norris and the jury should have been so instructed.

In other words, the jury should have been given these theories or any other theories under which they could find these conversations admissible at the time the witnesses testified to the conversations. It was not sufficient to wait until the conclusion of this long case involving seven defendants and twenty salesmen not charged to instruct the jury on the conditions of the admissibility of this evidence. This is the very least an accused is entitled to in a case where the Government proceeds to try him jointly and he is "confronted with a hodge podge of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of the existence" of a scheme. See **Krulewitch v. United States**, 336 U. S. 440, 445, 453 (concurring opinion). As for an instruction given at the conclusion of the case, it is doubtful if any instruction could be given at that time which would have dissipated the harmful effects of admitting it without limitation. Cf. **United States v. Phillips**, 7 Cir., 217 F. 2d 435, 443-444.

As a practical matter, the choice between separate and joint trials is that of the prosecution subject to a discretionary motion for a severance. When such a choice is made the separate interest of each defendant must be emphasized throughout the joint trial so that a defendant may not be found guilty just because of his associations.

2. The trial court refused and failed to give any theory of defense instructions although such instructions were requested and exceptions saved (R. 850-856, 961-962). Reistroffer requested the court to tell the jury that it was his position that he made no fraudulent statements, that he was not responsible for any representations of the distributors and that he did not intend to deceive anyone (R. 848-849). He also sought to have the jury instructed that if he relied on the purchaser reading the statement in the purchase order stating there was no reliance on representations not contained therein, that this might be considered as bearing on his good faith (R. 844-846) and that any defendant who acted in good faith as to statements made or authorized, defendant should be acquitted (R. 835, 837, 840, 842). The court below held that instructions stating "defendant had plead not guilty and that the burden of proof beyond a reasonable doubt was on the government, covered all defendant was entitled to" and that the theory that Reistroffer did not attempt to defraud anyone was not supported by the evidence.

The fact that the Court in its instructions has given the jury all the elements necessary for them to convict does not eliminate the requirement of an instruction on the defense theory of the case. **Little v. United States,** 10 Cir., 73 F. 2d 861, 867. The instructions at no point specifically call the jury's attention to the theory of defense. A defendant has a right to have his defense submitted to the jury in a direct way. The theory of defense instruction is even required when defendants do not testify and offer no evidence. **United States v. Phillips,** 7 Cir., 217 F. 2d 435. The facts set forth in the requested instruction could have been inferred by the jury from the evidence presented by the Government as well as from Reistroffer's statement to the Postal Inspector (R. 657-674). There was also evidence to support the following: The distributors were told in the sales manual not to make false statements and to obtain good locations if locations were

promised (R. 53-54, 67-68). The National purchase order in bold type said it contained all the terms of the agreement between the purchaser and the company, that the purchaser is not relying on any representations not contained therein and that the company assumes no responsibility for securing locations and does not grant exclusive territory (R. 85-87). The Continental purchase order also stated that in the event the purchaser fails to comply with the agreement any amounts paid would be applied as settlement of all damages (R. 748-750). Silver King told Reistroffer that it would take about two months to produce the machines and that it could produce 200 machines a month (R. 615, 617). There were difficulties in connection with the water tanks (R. 616). Reistroffer said he wanted to get out of the vending business (R. 696).

The jury could have inferred from this evidence that Reistroffer did not intend to defraud or deceive anyone. Reistroffer did not have to testify that he did not intend to defraud or deceive anyone in order to have an instruction set forth those facts. No one would quarrel with the rule that in order to prove an intent to defraud or deceive the Government does not need direct evidence of such intent as the state of mind of a defendant may be inferred from all the facts and circumstances in evidence. If it is proper for a jury to infer by circumstantial evidence that a defendant defrauded or deceived, it is likewise proper for the jury to infer that he did not intend to defraud or deceive from circumstantial evidence. It is not the province of the trial judge or the Appellate Court to appraise the reasonableness or unreasonableness of evidence relative to a defendant's theory of the case. See **Tatum v. United States**, D. C. Cir., 190 F. 2d 612, 617.

3. On December 17, 1952, subsequent to all National sales mentioned in evidence and subsequent to all National letters on which there were convictions, Reistroffer was interviewed by a postal inspector and told him that he had

advised most salesmen that delivery would be delayed (R. 659), that in selecting salesmen "Rogers knew who endorsed the references right through" (R. 660), that the salesmen provide their own newspaper advertisements and are independent contractors (R. 661) and that Rogers "gets an override on distributors he sets up." Reistroffer also said in respect to statements made by salesmen to customers with "respect to the securing of locations, exclusive territory, large earnings, installation services" that "you know how salesmen are, they are anxious to make the sale" (R. 663). Declarations in letters from Reistroffer to the postal inspector dated from December 22, 1952, to February 9, 1953, were also admitted into evidence (R. 664-674).

An objection to the entire interview for the reason it was hearsay, a conclusion, self-serving, not binding upon the defendant and request that it be stricken were made and overruled (R. 663). It should also be noted that the last identification of Norris was in June, 1952. It should be noted that neither the trial judge nor the jury found a continuation of any alleged scheme to sell hot coffee vendors after December, 1952. Indeed, the last sale of hot coffee vendors which was found to be part of the alleged scheme occurred in July, 1952 (R. 521).

Rogers and Norris believe that the admission of this testimony against them constituted a gross violation of the hearsay rule and that its admission does not come within any of the exceptions to the hearsay rule. Conspiracy cases are in point. Although it is true that declarations of a co-conspirator may be used against another on the theory that the declarant is the agent of the other, nevertheless such declarations can be used against a co-conspirator only when made in furtherance of the original conspiracy. **Fiswick v. United States**, 329 U. S. 211; **Logan v. United States**, 144 U. S. 263. Therefore, once the conspiracy or alleged scheme has been completed state-

ments made thereafter can never be admissible against one who was not present when the statements were purportedly made. See also **Krulewitch v. United States**, 336 U. S. 440.

The exception to the hearsay rule, which permits the admission of such statements when made in the furtherance of a conspiracy, has been scrupulously observed by the courts. It cannot be expanded to the instant situation by concluding that there is "no scheme proven that was segregated and unrelated to the general inclusive scheme charged in the indictment . . ."

Certainly if these statements of Reistroffer are to be admitted into evidence, the trial judge should have been careful at the time of admission and by its instructions to make it clear to the jury that such evidence is limited as against the particular declarant. **Lutwak v. United States**, 344 U. S. 604. Even in such instances the jury would have a difficult burden in segregating what evidence was to be applied to which of the particular defendants. But where, as here, the Court admitted the evidence generally and without any particular limitation as to Reistroffer, the jury must certainly have understood that it was competent evidence that would be considered by them in determining the guilt of Rogers and Norris.

4. The vice-president of the Silver King Corporation was offered as a witness by counsel for Reistroffer. In his cross-examination by the government he testified he was present in January, 1952, when the production of the coffee machine was discussed by Reistroffer in Rogers' presence (R. 784) and stated further that Rogers was present at the time a decision was made to produce a small coffee machine (R. 787). This was the machine which the government attempted to show was inadequate and inferior throughout the course of the trial. When counsel for another defendant attempted to cross-examine him, the Court stated that the witness was not regarded by the court for cross-examination by defendants and that leading

questions could not be put to him (R. 788-790). An objection by one attorney was considered throughout the case as if made by all (R. 229-230, 51). Rogers should have been permitted to cross-examine this witness concerning his presence at these discussions. Defendant Glen Feldman, an office employee at both National and Continental, testified in his own behalf. Feldman signed the letters which were the subject matter of Counts 2, 4, 6, 7, 10, 14, 15, 16, 17, 19, 20, 22, 27, 28, 29, 30, 32, 33 and 34.[3] The letters which Reistroffer signed were mainly form letters[4] while the letters Feldman signed were generally in answer to complaints. Feldman said he usually answered correspondence after an order was completed (R. 825) and that he received the information to put in these letters either from Reistroffer or from information that he heard in the office (R. 808-816). Counsel for Reistroffer was not allowed to cross-examine Feldman. He was stopped when he attempted to cross-examine him by using leading questions (R. 826-827). Counsel for another defendant was stopped when he tried to cross-examine him as to whether or not the distributors were advised of production difficulties. This latter form of cross-examination would also have inured to the benefit of Rogers since the chief evidence concerning him involved his statements to purchasers.

The right to cross-examination is a matter of right. The decision below conflicts with the principles of **Alford v. United States**, 282 U. S. 687, 692, which said:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not in general apply * * * it is the essence

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[3] R. 385, 378, 396-397, 402, 355, 438-439, 331-332, 586-587, 424, 450, 462, 553, 483-484, 705; 713, 718, 729, 743, 724.

[4] R. 365, 151, 339, 457, 510, 359, 273, 260, 475, 415, 490, 505, 526, 409-410, 397, 752, 355, 467.

of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

It was apparent from the attitude of the trial judge by his statements that "the court doesn't regard this as cross-examination," and "where it is not in fact cross-examination, the court cannot regard it as such" (R. 788-790), that the court considered the interests of all defendants identical in regard to these witnesses.

5. Although the trial judge favored having a handwriting expert, as being in furtherance of justice, in order to determine whether Norris's handwriting was on the two purchase orders, the court nevertheless denied Norris's request for the services of such an expert primarily because "the Court has no way of reimbursing an expert witness" and "I think it is one of those situations where you just can't provide expert services for indigent defendants" (R. 606-609, 662). The trial judge thus thought he had no power to obtain the services of such an expert. The majority of the appellate court, on the other hand, affirmed on the theory that the trial judge had exercised discretion and that the refusal to subpoena the expert "at government expense does not present such abuse of discretion and prejudice to Norris as to require reversal of the judgment against him."

The Federal Rules of Criminal Procedure provide a method of reimbursing expert witnesses. Rule 17 (b) covers the subpoenaing of witnesses for indigent defendants and states that if a subpoena is so issued the fees of the witness so subpoenaed shall be paid in the same manner in

which similar costs and fees are paid in cases of a witness subpoenaed in behalf of the Government. Under Rule 28 the Court may order the defendant or the Government or both to show cause why expert witnesses should not be appointed, may request the parties to submit nominations and "may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law." These rules, when construed together, embrace the situation which the trial judge found uncovered. The reasons given for the denial of the motion were inadequate. Rule 28 should be "construed with the greatest liberality" and its "instruction should not be based upon hair-splitting technicalities." **United States v. Cancellieri**, E. D. N. Y., 5 F. R. D. 313. The trial judge should not have assumed that the expert would not consent to an appointment.

In any event, if this expert would not have consented, the Court should have appointed such an expert on its own motion. The failure to subpoena or appoint an expert witness for Norris denied him due process and the right to a fair trial. Cf. **United States v. Brodson**, 7 Cir., 241 F. 2d 107. The weight to be given to expert testimony is for the jury. **Hodge v. United States**, 6 Cir., 13 F. 2d 596, 599. A non-indigent defendant would have been able to use compulsory process under the Sixth Amendment to subpoena a handwriting expert to give his opinions on the comparison of the handwriting on the document with defendant's handwriting. Certainly an indigent defendant should not be put in a worse position. An indigent defendant must be afforded the same rights at the trial as a defendant who is able to afford the expenses incidental to a trial. Indeed a serious question is presented whether or not this defendant has been denied due process by not being allowed to subpoena such an expert. Cf. **Eskridge v. Washington State Board of Prisons**, T. P., 357 U. S. 214.

While the trial judge did not put its denial on discretionary grounds, a denial on such grounds would have been

an abuse of discretion. This is not a case where a Court disallows witnesses to be subpoenaed at Government expense who merely would give cumulative testimony. See **Goldsby v. United States**, 160 U. S. 70. It is settled in this regard that a Court has the power to limit reasonably the number of witnesses upon a single point to curtail cumulative evidence. **Burgman v. United States**, D. C. Cir., 188 F. 2d 637, 641-642.

There were sufficient specimens of Norris' handwriting in the record to make comparisons. His signature was on each of his affidavits seeking the subpoenaing of witnesses at Government expense. There was no basis for assuming that Norris would not have furnished additional handwriting samples. Besides this only went to the weight of the testimony and not its admissibility. Moreover admitted or proved handwriting such as the handwriting on these affidavits of any person is admissible for purpose of comparison to determine the genuineness of other handwriting attributable to such person. 28 U. S. C., § 1731. And the testimony of a handwriting expert has been held admissible where the expert only had for comparison a few documents already in evidence. **Fuston v. United States**, 9 Cir., 22 F. 2d 66; **Brandon v. United States**, 9 Cir., 190 F. 2d 175, 177; **Desimone v. United States**, 9 Cir., 227 F. 2d 864. A different rule would make forgery prosecutions difficult if not impossible.

It is clear that Norris needed the services of such an expert. He produced an attorney who disputed his identification on the only conviction count in which he was identified as the salesman (R. 764-765). The two witnesses who said that he sold them vending machines both stated that Norris' signatures were on documents in evidence. Expert testimony that his handwriting was not on the Dobson and Leid exhibits would have acquitted Norris.

Norris had the right to comment on the failure of the Government to call a handwriting expert. The failure to

call a material witness, without good cause shown, justifies if it does not compel the inference that the testimony of the absent witness would have been unfavorable and the opposing party even has a right to introduce evidence to excuse such an absence. **Schumacher v. United States**, 8 Cir., 216 F. 2d 780, 787-788. The Government could have produced such a witness to testify whether or not he could form an opinion based on the exhibits in the record. And the cases herein cited indicate that sufficient samples were available. The striking of Norris' argument in this respect was prejudicial error. The Government had no right further to argue that Norris could have subpoenaed any witness, expert or otherwise. This was contrary to the facts before the Court and the motion for a mistrial should have been granted. It is apparent that these errors were prejudicial, especially when the weak case against Norris is considered against the strong evidence introduced by him. It should also be noted that in count one he was found guilty of one crime, the mailing of a letter on February 2, 1952, which was over a month prior to his first identification in the record.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,652

Leo P. Reistroffer, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Northern District of Iowa.

No. 15,653

W. L. Rogers, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Northern District of Iowa.

No. 15,654

Marvin Norris, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Northern District of Iowa.

[July 29, 1958.]

Morris A. Shenker for Appellant Leo P. Reistroffer; Sidney M. Glazer for Appellant W. L. Rogers (William E. Ginsburg was with them on the brief for Appellant W. L. Rogers.)

Mark M. Hennelly for Appellant Marvin Norris.

Theodore G. Gilinsky and Philip C. Lovrien, Assistant United States Attorneys (F. E. Van Alstine, United States Attorney, was with them on the brief) for Appellee.

Before SANBORN, WOODROUGH, and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, Circuit Judge.

The appellants in these three separate appeals (submitted here on one record) were indicted together with four other persons for violations of the Mail Fraud Statute, Title 18, United States Code, Section 1341, were tried jointly and were found guilty by the jury. The sentences upon appellants Leo Peter Reistroffer and W. L. Rogers were for five years on each of the counts on which they were found guilty, to run concurrently; and appellant Marvin Norris was given one year to run the same way.

The basic charge of the indictment was: that commencing on or about the 25th day of October, 1948, and continuing to on or about the 22nd day of January, 1954, defendants devised a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises from some thirty-five named persons and from other residents of the United States and its territories and Canada, who could and would be induced by defendants, to purchase coin-operated vending machines and products to be sold and dispensed therefrom, for cash before delivery, and in each of the thirty-five counts of the indictment the mailing of a letter, done or caused to be done by defendants, on a certain date on and between February 2, 1952, and January 30, 1954, to one of the thirty-five named victims of the scheme for the purpose of executing the scheme, was alleged in the words of the statute.[1]

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[1] Section 1341 of Title 18, U.S.C.A. provides:

"Whoever, having devised * * * any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * for the purpose of executing such scheme or artifice or attempting to do so places in any post office or authorized depository for mail matter any matter or thing whatever to be sent or delivered by the Post Office Department * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The indictment was based on defendants' conduct of their business of selling, in large part through the use of the mail, coin operated vending machines and products to be vended therefrom in many cities under the names of National Advanced Vending Company from 1948 to April of 1952, and thereafter up to January 30, 1954, under the name of Continental Merchandising Corporation. They had an office at 410 Main Street, Dubuque, Iowa, (which they moved for a short period of time to Rockdale, a suburb of Dubuque and then returned to the Main Street address) and an organization of traveling salesmen working entirely on commission. They did not have a substantial inventory, nor machinery, nor capital investment, and under their method of operation they sold vending machines and obtained sums of money from a large number of persons in advance of delivering anything to them, except a contract upon a printed form, hereinafter described. They used considerably less than half the money obtained from purchasers to buy coin operated vending machines of a sort from Silver King Manufacturing Company of Aurora, Illinois. That Company shipped the machines to the purchasers who had ordered them. All of the purchasers called by the government as witnesses had failed in their attempts to make gainful use of the machines they received; they lost all or nearly all the money they paid out for them and they testified to pretenses, representations, and promises which induced them to purchase—which were charged in the indictment to have been false and fraudulent.

The trial of the case continued over twenty-five days of elapsed time and some ninety witnesses were examined and approximately 1400 documentary exhibits were introduced. The jury had the office records of National Advanced Vending Company and Continental Merchandising Corporation before it and was informed of the position of defendants in the companies and their functions as well as their interests

in the proceeds of the business; the forms and uses of their advertisements; their manuals of instructions supplied to salesmen and used by them; their brochures furnished to salesmen containing testimonial descriptions and photographs of vending machines and men at work on them; and statistical matter. The sales talks of salesmen with the purchasers were testified to at length; the purchasers described their attempts and failures to make gainful use of the machines; a postal inspector gave an account of an extensive interview in December of 1952, with defendant Reistroffer and correspondence concerning the course the business had taken and was then in contemplation; and a great volume of correspondence between the home office and the complaining purchasers was introduced.

None of the appellants testified in their own behalf but the evidence afforded the jury a complete picture of the course of conduct which the defendants followed in making their sales. Having in mind the jury's finding of guilty, we outline from the evidence, considered favorably to the government, the controlling facts substantially supported by the evidence, as follows:

From 1948 to January 1952, defendants' sales included candy, nut, gum-ball, and sanitary napkin vending machines and thereafter the sales were largely confined to coffee vending machines, although sales of other types of vending machines, including machines for vending chlorophyll or Breath Master pellets, were also made. In making the sales, an advertisement like the following would first be published in a city's newspaper:

> "Hot Coffee Vendors—Manager Wanted—Man or Woman, to service route of new automatic coffee vendors, put in a coin and out comes a hot, steaming cup of coffee, every cup made individually will turn out a fresh cup every 3 seconds, no selling or soliciting, factory distributor will secure locations and make neces-

sary location arrangements in this area and surrounding territory. Ideal off-hour set up to start. $200 to $400 per week possible part time, full time more. Secured $1785.00 to $5950.00 required now. Please do not waste our time unless you have the necessary capital and positive that you want to go into the coffee vending business, not next month—not next week—Now, as we are definitely going to establish some reliable party in this area immediately. If you can follow instructions and supervision of a large national concern with a Dun and Bradstreet rating, references from Banks, Chamber of Commerce, etc., you should become financially independent within a very short time. Write fully about yourself giving age, phone number, write Box A-256 c/o Journal Tribune."[2]

The salesmen would be assigned about a week after the publication to operate in a hotel or motel room in the city where the advertisement was published and they would immediately get in touch with persons who answered the advertisement. They followed certain prescribed steps indicated by the sales manuals with which they were provided; the first step being to "qualify" the prospect, which meant that after being assured that he could pay cash they falsely pretended to be concerned and made inquiries of him about whether he had qualifications required by the companies for "their" machine operators. Then pursuant to a common plan of sales talk the salesman induced the sale and obtained the cash, either the entire selling price or a large part thereof with an agreement for the balance to be paid C.O.D. On making a sale the salesman receiving the money always obtained the signature of the purchaser on a printed form of order for machines or products to be vended therefrom or both, appearing to be drawn upon the salesman who was referred to by name and as Independent

[2] Apparently an advertisement in a Sioux City, Iowa newspaper in January, 1952. Some immaterial variations in this initial advertisement occurred, but the substance of it remained the same.

Authorized Distributor for National Advanced Vending Company and later Continental Merchandising Corporation. The order recited that it was complete in itself and contained all the terms of the sale and provided that the merchandise was sold under a warranty of the manufacturer which would "make delivery as soon as it is possible to do so and that the delivery date will be contingent on the availability of labor and suitable material; that this order shall stand valid the Manufacturer to procure labor and suitable materials, but in no case shall such time exceed three months [later six months] from the date hereof" and that the purchaser was not relying on any representations, promises or warranties not contained in the order.

The coffee machines appear to have cost defendants about $275.00. They sold them at various prices around $590.00 to $690.00 apiece, transportation charges being paid by the purchaser. Immediately upon closing with the prospect the salesmen reduced the proceeds to cash money and left town for other parts. They always sent the money to the home office and received a 30 or 40 per cent commission, but the purchasers were never able to contact them and neither saw nor heard from them again. National Advanced Vending Company and Continental Merchandising Corporation ordered the vending machines from Silver King Manufacturing Company of Aurora, Illinois, only after they had received the money from the purchasers and that company experimented and ultimately produced and shipped to the purchaser the number of machines ordered by him or her. The defendants caused the shipments of a number of machines to be made out of machines they received back for a nominal consideration from disappointed purchasers who could not use them.

The newspaper advertisement attracted persons, as it was designed to do, who were entirely ignorant and uninformed about the business of selling by vending machine. It conveyed to such persons directly and by implication of

the wording that a large, responsible, established, and by necessary implication, experienced, informed and successful company was manufacturing and selling the vending machines; would secure suitable and profitable locations for them; would instruct the purchasers in setting up the machines and servicing them; would cooperate and provide supervision of the enterprise with the purchasers; and having knowledge from successful experience could, and did, assure the purchasers that they would make large profits from the machines and "should become financially independent in a short time".

When the salesmen met prospects who answered the newspaper advertisement they added the power of the spoken word to the assurances of the printed publication expressed and implied. Their "pitch", as it was called, was enthusiastic, adapted, and intended to make the prospects believe that if they bought vending machines they would forthwith enter into established successful business associated with men who knew the business and would be furnished advantageous locations for the machines and instruction and supervision in setting them up and using them so that large profits would accrue to the purchasers.

The testimony as to the sales talks which the salesmen made to the prospects answering the newspaper advertisements is in the record in narrative form and has been studied. Of course each salesman was alert to adapt to the particular prospect, but in general he followed the line indicated in the newspaper advertisement. He was admonished in his manual of instructions that: "It is best to confine your talks to the business and profits rather than the mechanical end" and the bulk of the coffee machines were sold before any had been tried commercially or even manufactured. It was also impressed upon the salesmen that "the only way to sell this idea is our way" and the uniformity of the sales talks and procedure affords convincing proof that the selling of coin operated vending machines

was carried on according to a common understanding and intent among the defendants.

As soon as the money was received at the home office a letter was sent to the purchaser stating: "We have just received from our authorized independent distributor (naming the salesman) his order calling for machines to be shipped direct to you per the purchase order which you gave him. When new customers place orders with our independent distributors we like to give them a more formal welcome than the mere thanking that courtesy demands. We are therefore writing to express our pleasure in adding your name to our list of friends and operators." Designating the purchaser as one of "our operators" in the letter obviously served to enhance the assurance given by the salesman of the supervision and cooperation the purchaser would receive from the companies.

Some 59 of the purchasers of defendants' vending machines were called by the government and examined at length and there was no evidence that any one of them had ever been able to obtain anything like the earnings promised them from any machines purchased from defendants. Nearly all suffered total loss of all the money they paid—sometimes with tragic consequences. The efforts of individuals to save themselves varied and some gave up easier than others. But the situation in which they found themselves after they parted with their money was not what had been pictured to them and they were uniformly deceived.

Shortly stated, instead of starting "now", "immediately" into supervised "operations at advantageous locations" with instruction and with "automatic machines" as had been promised, the salesman they had dealt with as an "independent distributor" was gone as soon as he got the money. He was not an "independent distributor". There were no machines for "starting now" and in most in-

stances no locations were furnished, or if they were, they were found unsuitable when the purchasers checked them. There was no guidance or cooperation for the inexperienced and ignorant purchasers. The coffee machines were ultimately shipped at the end of a delay, up to six months, and they were found not to be automatic but required several manual operations and many of the purchasers could not make them work properly. Being left on their own without the promised supervision, no one could make any substantial profit with the machines.

The indictment sets forth some twenty specific false and fraudulent representations which defendants would and did make as a part of their scheme and artifice for the purpose of effecting sales of vending machines and products to induce the advancement of money therefor; to lull purchasers into a false sense of security; and to convince them they had no legal recourse when they complained, charged fraud, and demanded their money back, in substances as follows:

(1) & (2). That National and Continental were large, well-established reliable concerns; (3) that they manufactured vending machines; (4) that the cash required of the purchasers in advance was secured by inventory; (5) that the coffee vending machines were available; (6) that the purchasers would be instructed and supervised continuously; (7) that the "factory distributors" or other persons representing a large national concern would secure locations and make necessary arrangements, whereas National and Continental would and did disclaim all responsibility for securing locations; (8) that someone would be on hand to help install and to obtain good locations for the machines; (9) that the company was more interested in selling the products than in selling the machines; (10) that exclusive territory would be granted to purchasers; (11) that the contracts to be signed by the purchasers could be disregarded where they differed from oral representations

of the salesmen; (12) that the coffee machines were fully automatic; (13) that National held basic patents on hot coffee vending machines; (14) that it would supply all products made at wholesale prices; (15) that additional machines could be bought to be paid for out of a percentage of the receipts therefrom; (16) that National would supply Bru Coffee that was suitable for the coffee machines; (17) that the hot coffee vending machines had been successfully operated by other purchasers in the past, were well perfected and little if any mechanical trouble could be expected (when in truth no coffee machine was produced for National or Continental until June of 1952 when seven were completed and defendants sold and collected money from sales of coffee machines from January 1952 on); (19) that (in answer to complaints of purchasers) the salesmen were independent distributors and that National Advanced Vending Company and Continental Merchandising Corporation had no knowledge of or control over their movements, activities and representations; (20) that delays in deliveries beyond the time when deliveries were promised were unforeseen and due to causes occurring since the date of sale.

Our study of the evidence convinces that there is substantial evidence to support the charge of false and fraudulent pretenses, representations, and promises in respect to each of the specifications enumerated and we conclude that there is substantial evidence to support the finding of fact against them necessarily included in the jury's verdict of guilty as to appellants Reistroffer and Rogers.

Opinion as to Reistroffer and Rogers.

A single very scholarly brief fully documented with citations is filed for these two defendants on their appeals and although it preserves the point that the evidence was insufficient and that acquittal as to them should have been directed at the close of all the evidence on that ground, it

does not argue that point beyond a paragraph and we think it is without merit. A request that was made and refused at the conclusion of the evidence for acquittal on the ground of variance will be discussed, infra.

The points elaborated are that the court erred (1) in admitting in evidence and not giving limiting instructions at the time of admitting the sales talks on both sides, i.e. what the salesmen said and what the purchaser said, and the many complaint letters from purchasers to National and Continental together with the replies thereto; (2) in admitting in evidence against defendant Rogers the conversation and letters between Reistroffer and Postal Inspector Nelson; (3) in admitting certain testimony concerning A. J. Kimball, G. C. Kimball, Mary Calhoun, Richard Trayler and Samuel Abbott; (4) in not allowing appellants the right to cross-examine co-defendant Glen Feldman and not allowing defendant Rogers to cross-examine witness Ernest Ellis; (5) in refusing to give certain requested instructions numbered 1, 4, 10, 15, 16, 18, 22, 29, 30, 32, 35, 38, and in failing to give any "theory of defense" instruction and in giving to the jury five instructions set forth in substance and which are discussed; (6) in refusing to grant a mistrial on account of incidents occurring at the trial; (7) in admitting testimony of Leo Sharp concerning Bru Coffee; (8) in not allowing physical demonstration of the coffee machine; and (9) in refusing requested instructions for acquittal at the close of the evidence on the ground of variance between the charges and the evidence.

1. In each of the fifty-nine instances where the government produced a witness to testify to the sale of vending machines made to him or her by National or Continental salesmen after he or she had responded to the quoted newspaper advertisement (or one like it) objection was made to almost every question propounded concerning the

sales talk that the talk was hearsay as to all or nearly all of the defendants on trial and therefore inadmissible as to them; that if it should none the less be admitted, a limiting instruction should be immediately given to the effect that the jury should not consider it unless the scheme to defraud was proved as charged and that the proffered matter was proved to be in furtherance thereof. The court overruled the objection. As soon as interrogation of a purchaser-witness was begun by the government and the objection and the alternative request was made, the court took cognizance thereof and immediately made inquiry of the prosecutor whether he had evidence to connect up the testimony to be elicited from the witness with the alleged scheme to defraud and to show that it was in furtherance of that scheme. The ruling admitting the evidence was not made until assurance in the affirmative was given and the inquiry proceeded, the court declaring that complete instructions would be given later. A typical instance of this procedure with the first purchase-witness was as follows:

> "Mr. Mason: Your Honor, I request that you instruct the jury any conversation with defendant Brown is not applicable to us or the other defendants.
>
> "The Court: Well, it is the government's plan to connect this up with the claimed activities of the defendant, and the rule is that the government has to start it some place. Of course, if it is not connected up the Court will instruct the jury to disregard it. They have a right to proceed in this matter and the objection is overruled.
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> * * * * * * * *
>
> "Mr. Lovrien: * * * the government at this time offers in evidence Exhibit 3-A.
>
> "Mr. Hennelly: Defendants would object to Government's Exhibit 3-A, your Honor, for the reason it is hearsay, proper foundation has not been laid for its introduction into evidence, it at this time would be a

violation of the constitutional right of the defendant; if the Court admits it we respectfully ask the Court to limit the document to the specific defendant.

"The Court: The Court refuses to limit it to this specific defendant. * * * I might state my position: That under the common plan, scheme and design they may offer their proof in support of the charge. Whether it is sufficient that will be for the Court or jury to decide afterwards. Under the circumstances we have a different situation * * * 3-A may be received. You may read this to the jury."

We find no error in the course followed by the Court. Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same misrepresentations being made at widely different places to different persons by numerous agents in the same period, tends to prove that the scheme existed and that the particular salesman was carrying it on. As in the case of a conspiracy in operation the acts and declarations of each participant is admissible against all. The record shows that the conditions on which the court permitted the testimony that would otherwise be hearsay to be considered by the jury were indicated by the court immediately through the inquiries made to the prosecutor; his replies; and the applicable law stated; reiterated constantly for the defendants; conceded by the prosecutor; and fully explained to the jury by the court in the instructions given.[3] That the testimony of the pur-

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[3] We find no specific exception taken to instruction number 11 given as follows:

"In the present case the Government has presented evidence as to statements made in the absence of the different defendants. Before you may consider such evidence as to any defendant, you must first find that the Government has by evidence apart from such statements established beyond a reasonable doubt (1) that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described

chasers concerning their conversations with the salesmen back and forth were admissible upon the conditions prescribed by the court finds support in the following cases, i.e.: *Smith* v. *United States*, 8 Cir., 267 F. 665, 668; *Langley* v. *United States*, 8 Cir., 8 F.2d 815, 820; *Eddington* v. *United States*, 8 Cir., 24 F.2d 50, 52; *Feigenbutz* v. *United States*, 8 Cir., 65 F.2d 122, 124; *McDonald* v. *United States*, 8 Cir., 89 F.2d 128, 135; *Alexander* v. *United States*, 8 Cir., 95 F.2d 873, 880; *Grell* v. *United States*, 8 Cir., 112 F.2d 861, 873; *Whitehead* v. *United States*, 5 Cir., 245 F. 385, 396; *Bogy* v. *United States*, 6 Cir., 96 F.2d 734, 741; *United States* v. *Beck*, 7 Cir., 118 F.2d 178, 185; *United States* v. *General Motors*, 7 Cir., 121 F.2d 376, 408; *Weiss* v. *United States*, 5 Cir., 122 F.2d 675, 680; *McDonald* v. *United States*, D.C. Cir., 133 F.2d 23, 24.

We find no error in admitting the sales talks and the subsequent correspondence showing the handling of complaints, accusations and demands of purchasers to get their money back. The evidence tended to show the scheme in operation and the participation therein of these two defendants. There was evidence that Reistroffer originated the business and was at all times the head and front of it. He changed his name from Leo P. Reistroffer to John

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in the Indictment, and (2) that the statement or statements were made pursuant to such scheme and in furtherance thereof.

"If the Government as to a particular defendant has so established both (1) and (2), you may consider such evidence in passing upon the guilt of such defendant and give it such weight as you feel it justly entitled to.

"If the government has not so established both (1) and (2), then you should reject such evidence and give it no consideration in passing upon the guilt of such defendant.

"The foregoing Instruction relates only to evidence as to statements made in the absence of a particular defendant. It does not relate to evidence as to statements made by such defendant or in his presence. Evidence as to the statements made by a particular defendant or in his presence may be considered by you in passing upon the guilt of such defendant even though the Government has not established (1) and (2) above set forth beyond a reasonable doubt."

Randall when the business carried on by National began to be carried on by Continental, but he at all times retained his place in it. Appellant Rogers was the sales director in both companies and controlled the salesmen and had the largest shares in the profits of the business by reason of such control.

2. As to the testimony of Postal Inspector Nelson. After identifying himself as having been a postal inspector stationed at Council Bluffs, Iowa, in 1952, Nelson testified that on December 17, 1952, he interviewed Reistroffer in his office in Rockdale and took notes of the interview. He had the notes with him and they refreshed his recollection. When he was asked to tell the court and jury the substance of that interview no objection was made except that a question was raised as to whether a sufficient foundation was laid for the use of the notes. This was settled by the court and the witness proceeded with his answer without objection being made until close to the end of his lengthy direct-examination. Then, when Nelson stated that he asked Reistroffer how he accounted for the fact that practically all of his salesmen have been charged with making false promises, counsel for defendants interrupted to say: "We object to that particular statement and the entire interview for the reason it is hearsay, and a conclusion, self-serving statement, not binding upon the defendant, and ask that it be stricken".

This was not considered a request to review Nelson's entire testimony that had been received without objection or to strike it out. The court simply said: "Overruled". The witness completed the question he had asked Mr. Reistroffer and the answer Mr. Reistroffer gave to it: "You know how salesmen are, they are anxious to make the sale".

It is argued for appellant Rogers on this appeal that the admitting of Nelson's testimony violated the rule as

expressed by the Supreme Court in *Krulewitch* v. *United States*, 336 U.S. 440. They assert that the statements ascribed to Reistroffer were made after the completion of the alleged scheme to defraud.

It may well be doubted that the sole objection to the testimony made by defendants, as above stated, sufficed to direct the court's attention to the point now presented, but in any event there is evidence that defendants' scheme was by no means terminated at the time of the Nelson interview. The defendants continued to sell hot coffee machines by the same means long afterwards. The evidence was that Reistroffer wrote letters trying to induce newspapers to recall stop orders they had issued against defendants' so called Business Opportunity or Quickie advertising and to continue defendants' advertising. The letters he wrote to the newspapers and the statements he made to Nelson were made with the same purpose in mind; to prevent stop orders against using the mail. They were in furtherance of the same scheme. The court did not err in admitting Nelson's testimony.

3. It appears that witness A. J. Kimball of Pontiac, Michigan, ordered and paid $2085.00 for three coffee vending machines in April, 1952, after answering defendants' usual newspaper advertisement and being persuaded by a salesman named Hamel. Salesman Hamel made representations which included: that the machines had been widely used on the west coast; that they were in production on a line of machines; that at the time they were practically all sold, "but if I was interested in obtaining some machines quickly he would take my order, and assured me that they would be shipped out of the machines that were on the present production line"; that the machine was so built that it would not require any plumbing connections and that's why this machine was so successful in the use in Universal Studio on the west coast; that the machine would use instant dry coffee; that the machine would be

selective as to whether the purchaser could get coffee that was black or with sugar or both sugar and cream; that the purchaser would get the coffee just the way he wanted it; and that there was a machine in operation in a theater in Detroit.

In the course of extended connected correspondence with National's home office (after he had made his purchase and failed to receive any machines), Kimball was told in a letter from that office and dated May 16, 1952, that his best opportunity to see the machines would be at the plant of Silver King Corporation in Aurora, Illinois, and that "once you have seen our vendor, I am sure you will agree that it is the best on the market". Kimball said: "I went to the theater in Detroit and there wasn't any machine there". He caused his brother George to go to Aurora and the brother testified that he went to the Silver King plant and found that no coffee vending machine had been produced, none was being produced, and that only a little experimentation with them was going on and so reported. Shortly thereafter another of the newspaper advertisements that had appeared in the Detroit Free Press appeared in the Pontiac Press. When Kimball answered it a salesman named Gorden came to Kimball's office at a time when his brother George was there. Kimball testified: "The conversation [with Gorden] went along the same line it had with [salesman] Hamel. [Gorden] told me * * * that they had these coffee machines * * * in production ready to make shipment * * * and he told me a good many of the same things Mr. Hamel did, it was portable, used instant dry coffee, it was selective, as to cream and sugar. He also wanted to go through his other sales statistics as to figures and earnings, etc., but I stopped him at this point when he made the essential facts that I knew weren't true."

Kimball accordingly reproached Gorden and threatened to call in the District Attorney, but Gorden begged him to

call Mr. Reistroffer instead. Gorden made a telephone call to Mr. Reistroffer in Dubuque and explained to him what had happened in Kimball's office and that Kimball was claiming false representations had been made to him. Kimball then talked to Reistroffer on the telephone and repeated his claims and in the end Reistroffer, having insisted there was a mistake and misunderstanding, promised that if Kimball would write in detail what had happened in the office and have the brother, George, write a complete report on what he had found out—immediately upon receipt of that information, he, Reistroffer, would make refund of the amount Kimball had paid for the three machines.

Kimball complied and wrote to National, attention Mr. Reistroffer, stating his charges of misrepresentation made to him by Hamel, which, following the newspaper advertisement, had induced his purchase of three vending machines. To which Reistroffer responded by letter that he was writing Hamel and Silver King for a full report. Telephone conversations and several letters then passed between Kimball and Reistroffer and in the end Reistroffer wrote that he was turning Kimball's file over to "our attorneys" and that libel proceedings would be instituted against him and that he would not answer any more of Kimball's letters, etc. The whole correspondence, verbal and written, taken together permitted the inference that although Reistroffer was fully informed of Kimball's claim that National had obtained Mr. Kimball's money by false pretenses, representations and promises, he, Reistroffer, was going to keep it; that he refused to make any explanation of the questions Kimball put to him and that he was threatening Kimball with a libel action and refusing to correspond further with him.

Mr. Kimball also testified that he finally received three coffee vending machines some six months after his pay-

ment and that they were not as represented by either Hamel or Gorden and "when we tried to operate the machine the results were very unsatisfactory". "In the first place we had to use liquid concentrate in the machines which had been represented to me to use instant dry coffee * * * we couldn't produce anything that tasted like a satisfactory coffee from this liquid concentrate. We didn't sell any."

In the course of the talks and letters in the Kimball transaction Reistroffer called some assertions of Kimball's "threats, lies and intimidations" and Kimball charged that representations made to him were "false and fraudulent" and on this appeal complaint is made against admitting the characterizations made by Kimball into evidence.

Somewhat similar impropriety of expression occurred in the course of proving the sale transactions with Richard Traylor, Mary Calhoun and Samuel Abbott. It is argued that the character of defendants was in that way erroneously allowed to be brought in issue. But in each instance the court gave careful consideration to the objections and motions to strike and for mistrial and by rulings and directions to the jury fully protected the defendants from prejudice. There is not the slightest reason to believe that the jury could have based any of its findings against any defendant on any mere characterization by a witness of a defendant's representations or of a defendant himself. We find no abuse of discretion or unfairness in the trial in respect to admitting testimony complained of under this point.

4. Complaint is made that defendants were denied the right to cross-examine the co-defendant Glen Feldman, who testified as a witness, and Ernest Ellis who was vice president of the Silver King Corporation which manufactured the vending machines for National and Continental and was called as a witness by defendants.

(a). As to Feldman, we do not find that any question propounded to him was excluded on the ground that it was cross-examination, nor that the court erred in excluding any question put to him.

(b). As to Ellis, the record shows that he was called and examined at length on direct examination by attorney Mason (attorney of record for defendants Reistroffer and Sheean) on behalf of all defendants and then after brief cross-examination further and at length on re-direct examination for all defendants by Mr. Mason. He was then again cross-examined by government counsel and again on re-direct (a third time) by Mr. Mason. Then Mr. Hennelly (of counsel for defendant Feldman), who had repeatedly made examinations of witnesses which were always deemed to be for all defendants, continued the examination of Ellis for all defendants. After a question or two Mr. Hennelly asked a leading question obviously calling for a "yes" answer favorable to defendants and the witness answered "Yes". The prosecutor belatedly interposed an objection on the ground that the question was leading and suggestive and colloquy ensued in which the court observed: "• • • You counsel were informed • • • you are on direct (examination) • • • the Court doesn't regard this as cross-examination, where it is not in fact cross-examination the Court cannot regard it as such. • • •."

Later there was further colloquy about the subject of cross-examination, but no claim was made that the witness had given any damaging testimony against any defendant in respect to which or on account of which any defendant wanted to cross-examine him. There was no indication that he was a hostile witness as to any defendant. He was not prevented from answering any question propounded to him on the ground that it was cross-examination.

Appellants, in respect to this point, rely on *Alford* v. *United States*, 282 U.S. 687, where a prisoner in custody

was called as a witness by the prosecutor and gave damaging evidence against the defendant. Upon cross-examination by defendant questions seeking to elicit the witness' place of residence were excluded. The Supreme Court reversed. It observed that the purpose of the questions were to show by such facts as proper cross-examination might develop that the testimony was biased because given under promise or expectation of immunity or under coercive effect of detention of the witness by officers of the United States which was conducting the prosecution against defendant. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to reasonable cross-examination. There was no analogous situation here and we find that there was no erroneous denial by the court of any right of cross-examination.

5. The refusal of requested instructions. The instructions requested were 39 in number and complaint is here made of the refusal of thirteen of them, as enumerated. The court gave 41 numbered instructions and we have made comparison between the thirteen refused and those given and counsel for the government have also analyzed and put in parallel columns the instances where the refused instruction was corrected as stated by the court and included in substance in the instructions that were given. Requested instructions numbered 1, 4, 10, 15, and 22 were so covered. Requested instructions numbered 29, 30 and 32 refused, simply attempted to have the court comment favorably to defendants on parts of the evidence. In those numbers the requests were that the jury be told that they might consider three of the provisions of the purchase order form as three circumstances indicating that defendants did not authorize any representation not contained in the form. But other proven circumstances tended to rebut such an inference. The issue was for the jury and the court responded to the three requests, 29, 30 and 32, by adding the last 2 paragraphs to its instruction number 9 to make it read as follows:

"Where two or more persons knowingly and intentionally participate in devising a scheme to defraud or to secure money or property by means of false pretenses, representations or promises, and in pursuance thereof and in furtherance of such scheme one of the participants secures the signature of a person sought to be defrauded to a document by means of false pretenses, representations or promises, the making of such false pretenses, representations or promises becomes the act of all the participants in the scheme and each participant is a party to securing such signature by means of false pretenses, representations or promises. One who is a party to securing a signature to a document by means of false pretenses, representations or promises is not relieved of chargeability for such pretenses, representations or promises because of the provisions of the document.

"Where a person has not knowingly and intentionally participated in a scheme of the nature referred to, he is only chargeable with the false pretenses, representations or promises made by himself or which he authorized, approved or ratified. Unless a person has knowingly and intentionally participated in a scheme of the nature referred to, he may not be held to have authorized false pretenses, representations or promises unless it first be proved that he had actual knowledge of the making of them.

"A jury in determining whether a person has actual knowledge of the making of false pretenses, representations or promises may and should consider the provisions of the document or documents submitted to or otherwise coming to such person's attention together with all of the other facts and circumstances shown by the evidence.

"A jury in determining whether certain claimed false pretenses, representations or promises were in fact made by the person alleged to have made them in a certain transaction may and should consider the

provisions contained in such document together with all of the other facts and circumstances shown by the evidence."

The court thereby fully covered by proper declaration of law all that defendants properly requested in their number 29, 30 and 32 requests and they seem to have no longer maintained their objection to No. 9 as given by the court.

Requested instructions 16, 34, and 35 were fully covered by instructions given and 38, purporting to state the "position" of defendant Reistroffer "that he did not intend to defraud anyone; that he did not intend to deceive anyone", etc., etc., was not a proper instruction based on or related to any evidence. The instruction that the defendant had plead not guilty and that the burden of proof beyond reasonable doubt was on the government covered all defendant was entitled to.

As to requested instruction number 18 to the effect that "it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell and within any proper and reasonable grounds such a practice is not criminal, etc.," the court did not abuse its discretion in refusing to give it. No charge was laid on any mere exaggeration or puffing of goods for sale, none was relied on by the government and no instruction given permitted conviction on such grounds.

We find no error in the refusal of the said numbered instructions requested by defendants or in the failure to give any theory of defense instruction.

6. The incidents occurring at the trial upon which mistrial was demanded and refused were trivial.

(a) A witness could not identify by sight the defendant Bramblet who was standing before him, but said: "Prob-

ably if I could hear his voice I could maybe tell more about it, it was in '52." The prosecutor said: "Count to five please". Mr. Hennelly objected and asked that it be stricken and that the jury be instructed to disregard it. The court immediately sustained the objection and ordered it to be stricken and the jury to disregard it. Whether Mr. Bramblet had any objection does not appear. There was no answer and no possible prejudice to defendants. *Johnson* v. *Commonwealth*, 9 Atl. 78; *Beacham* v. *State*, 162 S.W.2d 706; *State* v. *Taylor*, 49 S.E.2d 289; *State* v. *Griffin*, 129 S. C. 200, 124 S.E. 81; Inbau, Self Incrimination, 49-51; Wigmore on Evidence, Section 2265.

(b) Witness Rayner in testifying to a telephone conversation between himself and Reistroffer included as part of the conversation: "I says, you are nothing but a damn exconvict". The court promptly instructed the jury to disregard it and admonished the jury: "There is no proof of the claims made, apparently [in] anger and argument over the phone." The court further stated in the absence of the jury: "The court heard the whole thing—saw the jury. They regarded him [the witness] with tolerant amusement. The court says that is one of the inadvertent statements which come in occasionally and there will be no mistrial."

There was no abuse of discretion by the court in its treatment of what was actually a mere rudeness on the part of the witness.

After presenting the contentions concerning refusals of the court to give requested instructions, which contentions only incidentally included complaints against some of the instructions that were given, the brief for the two appellants takes up the instructions which the court gave and upon analysis of them it is earnestly insisted that they include fundamental errors so prejudicial to these defendants as to have deprived them of a fair trial.

These arguments appear to us to derive mainly from the position asserted for these appellants that, although the indictment charged only one scheme to defraud, there were under the proof three possible schemes and that there was consequently a fatal variance.

They made no claim of variance at the conclusion of the government's evidence, but included a general charge of variance in the motions for acquittal at the end of all the evidence. It is true that in this case there was proof that defendants sold several different kinds of vending machines; that they used two different corporate names; that defendant Reistroffer went under different names; that a product called Bru Coffee they sold for use in the coffee machines was unfit; and that many different misrepresentations were made to effect sales. But we find no scheme proven that was segregated and unrelated to the general inclusive scheme charged in the indictment fraudulently carried on by repeating the same steps of procedure and actively participated in by all of these appellants.

The reliance of the appellants in respect to their claim of variance is largely upon *Kotteakos* v. *United States*, 328 U.S. 750. That was a conspiracy case where the convictions were under a single general conspiracy charged. But the government admitted that the evidence proved some eight or more different ones of the same sort, connected only because they were executed through a key man common to all. Different persons seeking to obtain money by fraud from the government obtained his help at different times but independently of each other. The Supreme Court reversed the convictions on account of the variance and the resultant unfairness of the trial as to individuals.

In this case the scheme as charged and proved was sufficiently unitary so that each of these appellants was connected with and bound by the proof that was offered and received against them or either of them. They all par-

ticipated in the common scheme to sell vending machines and products to be sold therein. Neither of them is entitled to reversal on account of any variance between the charge and the proof or on account of alleged error in the instructions given by the court and not excepted to at the time.

7. As to the Bru Coffee. Under this point error is assigned in respect to admitting the testimony of Leo R. Sharp and an exhibit produced by him, over defendants' "hearsay objection" and "request to limit".

Sharp was employed as a salesman for National by defendant Rogers personally and received his instructions for selling from Rogers. His contract with National, which he signed after speaking to Rogers, was introduced in evidence. It referred to him as authorized regional director distributor and was intended to cover all agreements and conditions for the purchase and sale of vendors. It did not specify coffee vendors. Mr. Rogers later on in the next year showed him what they had planned for him was to sell their Bru Coffee. They were perfecting it to be used in their coffee machines. Sharp sold it by the same method used for selling the vending machines. He said: "When the prospective purchaser answered the ads they answered by letters to the newspapers and [we] obtained our leads from them." "I had some of the coffee myself and there was something wrong with it. It was full of sediment. If you stirred it it would sour and ferment. Take the lid off it it would sort of explode like with the gas that had accumulated on it. * * * the newspapers over the State of Florida published notices to the effect the coffee had been condemned * * *.", and the witness gave all that he had to the State Officers.

It is argued that Sharp's testimony was erroneously admitted on account of variance; which as stated, we do

not sustain, and also, that his testimony as to the coffee being condemned and as to the newspaper notices was not the best evidence.

But what the witness said about the coffee being condemned and about newspaper notices was merely explanatory of the actions taken by him. He surrendered the coffee he had on hand to the Florida Officers. His actions followed upon information he received from the newspapers and a visit from Florida Officers. His testimony was not offered to prove the contents of the newspaper articles or any legal right of the officers. But his testimony as to his action was competent and the collateral matter explanatory of it was not barred by the best evidence rule nor by the hearsay rule. *Scullin* v. *Harper*, 7 Cir., 78 F. 460; *United States* v. *Aluminum Company of America*, 35 F.Supp. 820, 827.

8. The defendants introduced a coffee machine in evidence and their expert explained it at length and in detail to the jury; but the court denied defendants' request to permit him to demonstrate the operation of it before the jury. That ruling of the court is assigned as error. The court said that it did not want the demonstration because it could not be a matter of record. Counsel for the government also argue here that a single demonstration by the engineer who designed and constructed the machine would not be probative of how it would function in public service. The appellants argue persuasively for their contention that permission should have been given the expert to operate the machine. But the matter was within the court's discretion and we find no abuse of it.

Our conclusion on consideration of all the points of error, including some which we have considered but have not found necessary to discuss, is that the conviction of these two appellants is supported by the evidence and that a fair trial without error was accorded them.

Opinion as to Marvin Norris.

The prosecution against Norris was on the ground that he knowingly participated in the scheme to defraud, described in the indictment, as one of the salesmen for the companies who induced sales of vending machines by means of false pretenses, representations and promises alleged. It was not claimed that he wrote any of the count letters set forth or composed any of the advertisements. He was convicted on only four of the counts and sentenced to one year. He was represented at the trial by counsel appointed for him as an indigent defendant by the court and has appealed in forma pauperis. He has been ably and diligently defended in both courts. He did not testify in his own behalf but had the benefit of the objections and contentions that were urged against practically each and all the steps taken by the government in making out its case. He also had the benefit of the evidence adduced by the defendants and of certain witnesses called in his defense at government expense.

Early in the proceedings demand was made in his behalf for a separate trial which was denied and with all the evidence taken at the trial now before us, it does not appear that the denial was erroneous or resulted in any unfairness to him.

Having the benefit of his own counsel he was enabled to and did obtain full consideration by the court of every matter of defense to the charge against him that arose in the proceedings. The court did not fail to individualize his case from the group.

The evidence concerning the participation by Norris in the sale of vending machines as a salesman for the companies was confined to the year 1952. A purchaser of the machines named Joe Diehl testified that Norris accom-

panied the defendant salesman Kenneth Paul Brown, then going under the name of Cox, to Diehl's dwelling house on May 6, 1952, and participated in selling some of the vending machines to Diehl. There was discussion between the two salesmen in Diehl's presence as to who should make out the purchase order.

Another purchaser of the vending machines named Harry Rayner testified that a few days after defendant Brown, going under the name of Norris, had sold him some of the vending machines, he went looking for "Norris" at the hotel where the sale had been made and he got in touch with defendant Norris in the hotel lobby on about May 4, 1952. The conversation there included a question by defendant Norris: "What are you bellyaching about you have got the best deal in San Diego." Rayner said: "I'm going to find Mr. Norris.", and the reply of the defendant was that Norris had gone to Los Angeles.

A Mrs. Ruth Dobson testified that she answered the newspaper advertisement in a Spokane paper and that on about July 5, 1952, defendant Norris induced her to buy vending machines by means of false representations as alleged in the indictment. She was positive in her identification of Norris and said she saw him sign the purchase order for the machines.

The witness L. P. Leid testified that after answering defendants' newspaper advertisement in the San Francisco Examiner he met defendants Norris and Brown in a room in the Drake Hotel and that Norris was the one who induced him to purchase three coffee machines for $2085.00 on June 6, 1952, by means of false representations such as are set forth in the indictment. He was positive that Norris and not Brown did the selling. He said Brown left the room. Leid also said that Norris signed the purchase order.

The witness Martin E. Underwood, who bought into the Continental Company, testified that he met a Mr. Norris for a few minutes at the office of Continental and believed defendant Norris to be that person. He was not sure. The person was with defendant Brown.

Evidence adduced by Norris tended to prove an alibi for a part of the time when the witness said he was selling the machines. A witness for whom he obtained subpoena testified that he was the attorney for Mrs. Dobson who was present at the closing of her purchase of vending machines and that Norris was not the salesman in that transaction.

The members of this Court are unanimously of the opinion that the evidence adduced against defendant Norris was sufficient to constitute a prima facie case and to support the verdict and judgment against him. If believed, it established that the gist of the scheme to defraud was brought to his knowledge and that he joined in with the principal schemers to accomplish their purposes. It is not necessary for the government to prove that he was one of those who originally devised the scheme. When he joined in the selling and the misrepresentations and deceptions, although in comparatively few instances, he brought himself within the provisions of the statute.

It is earnestly contended that the court erred in refusing Norris' request to issue a subpoena at government expense for an expert witness, George Swett, as to whom defendant deposed that he fully expected him to testify that in his expert opinion the handwriting contained on the purchase orders concerning which Ruth Dobson testified and also the handwriting on the purchase order which L. P. Leid testified about is not the handwriting of the defendant Marvin Norris.

It appeared to the trial court that since Norris chose not to take the witness stand and produce samples of his

handwriting and in the court's long experience, experts on handwriting could not be expected to give an opinion without laboratory tests and sure bases for comparisons, there was too much uncertainty to justify the expense of bringing the expert witness from St. Louis, where he lived, to the place of trial at Waterloo. It is also pointed out for the government that proof that the particular signatures referred to were not in the handwriting of Norris even if established would not have constituted a complete defense to the charges and the evidence against Norris.

It is well settled that Rule 17(b), Federal Rules of Criminal Procedure, under which the motion for subpoena was made, does not accord the indigent defendant an absolute right to subpoena witnesses at government expense. There is and must be wide discretion vested in the District Court to prevent the abuses often attempted by defendants. This Court will not disturb the exercise of the discretion unless exceptional circumstances compel it. *Gibson* v. *United States,* 8 Cir., 53 F.2d 721, 722.

The majority of this Court is convinced that the refusal of the District Court to subpoena George Swett at government expense does not present such abuse of discretion and prejudice to Norris as to require reversal of the judgment against him.

It is also contended for Norris that the prosecutor was guilty of misconduct in expressions he used in his final argument to the jury and that the court erred in failing to award Norris a mistrial as requested on account thereof.

The record shows that in his address to the jury counsel for Norris made an argument to the effect that the government ought to have consulted handwriting experts in the preparation of the case against Norris. In reply the prosecutor said that Norris had the privilege of calling such experts. In response to objections and a motion for mistrial,

the District Court observed that it was counsel for Norris who had brought the subject of handwriting experts into the jury argument and that the prosecutor had followed. The prosecutor was directed to go no further with it. The jury was directed to disregard what was said about it on both sides. The motion for mistrial was denied.

The majority of the Court is of the opinion that this incident of the trial occasioned no such prejudice to Norris as to justify reversal of the judgment against him and that the refusal of the court to grant a mistrial on account of it was not erroneous.

Counsel for Norris has covered many points in his brief that have been discussed in the opinion as to Reistroffer and Rogers, and other points which have been fully considered but have not required discussion. We find no error requiring reversal of the judgment against Norris and it is affirmed.

Affirmed as to defendants Reistroffer and Rogers.

Affirmed as to defendant Norris.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment in Cause No. 15652.)

United States Court of Appeals
for the Eighth Circuit.

No. 15652.....September Term, 1957.

Tuesday, July 29, 1958.

Leo P. Reistroffer, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Northern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Northern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the appellant in this cause, Leo P. Reistroffer, one of the defendants in the said District Court, do surrender himself to the custody of the United States Marshal for the Northern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

July 29, 1958.

(Judgment in Cause No. 15653.)

United States Court of Appeals
for the Eighth Circuit.

No. 15653.....September Term, 1957.

Tuesday, July 29, 1958.

W. L. Rogers, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Northern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Northern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the appellant in this cause, W. L. Rogers, one of the defendants in the said District Court, do surrender himself to the custody of the United States Marshal for the Northern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

July 29, 1958.

(Judgment in Cause No. 15654.)

United States Court of Appeals
for the Eighth Circuit.

No. 15654.....September Term, 1957.

Tuesday, July 29, 1958.

Marvin Norris, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Northern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Northern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the appellant in this cause, Marvin Norris, one of the defendants in the said District Court, do surrender himself to the custody of the United States Marshal for the Northern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

July 29th, 1958.

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FILED
DEC 5 1958
JAMES R. BROWNING, Clerk

No. 493

In the Supreme Court of the United States

OCTOBER TERM, 1958

LEO PETER REISTROFFER, W. L. ROGERS AND MARVIN NORRIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 493

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 23–54) is reported at 258 F. 2d 379.

JURISDICTION

The judgments of the Court of Appeals were entered July 29, 1958 (Pet. App. 55–57), and petitions for rehearing were denied on September 11, 1958. On October 2, 1958, Mr. Justice Whittaker extended the time for filing a petition for certiorari to and including November 5, 1958. The petition for a writ of certiorari was filed on November 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a trial for mail fraud involving numerous transactions, the court, before receiving testimony of each victim, should have instructed the jury as to the admissibility against co-defendants of declarations by a co-conspirator, in a case which the subject was fully covered in the instructions to the jury.

2. Whether the court erred in refusing requested instructions which were not supported by the evidence, amounted to comments upon the evidence, or were covered by other instructions.

3. Whether the statements of one conspirator were properly admitted as having been made during the course of the scheme.

4. Whether one defendant should have been allowed to ask leading questions of a co-defendant or of a friendly defense witness under the guise of cross-examination.

5. Whether the court abused its discretion in denying process at government expense for an expert witness requested by an indigent defendant, where at best that witness could testify only to a collateral issue.

STATUTE AND RULES INVOLVED

18 U. S. C. 1341 provides:

> § 1341 *Frauds and swindles.*
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish

or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 17 (b) of the Federal Rules of Criminal Procedure provides:

(b) *Indigent Defendants.*

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in

the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

Rule 28 of the Federal Rules of Criminal Procedure provides:

> Rule 28. *Expert Witnesses.*
>
> The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

STATEMENT

Petitioners and four others were indicted in the Northern District of Iowa for devising a scheme to defraud and to obtain money by false and fraudulent promises (R. 1–28). Petitioners Leo Peter Reistroffer and W. L. Rogers were each convicted on 26 counts of using the United States mails for executing

the scheme and received five year concurrent sentences on each count (R. 966–967, 977–979). Petitioner Marvin Norris was convicted upon four similar counts and was given one year concurrent sentences on each count (R. 967–968, 980–981). The Court of Appeals affirmed. 258 F. 2d 379.

The evidence is summarized in the opinion of the Court of Appeals (Pet. App. 26–32) and its sufficiency is not challenged here. In brief it showed an organized scheme to get money for vending machines on the basis of false representations and promises.

The indictment charged 20 specific false representations and promises used to carry out the scheme and sell various vending machines and products (R. 7–11), including false promises of profit, false representations as to immediate delivery, and false statements concerning help in installation or securing good locations for the products (R. 8–10). The proof of these false representations extended from 1948 into 1954 (R. 1, 118, 747), covered machines for selling candy, nuts, coffee and chlorophyll pellets (R. 85, 576–589, 748), sold under such company names as National Advanced Vending Co. or Continental Merchandising Corporation (R. 85, 747). During the course of the trial 59 purchasers testified.

The mode of operation may be summarized as follows: An advertisement was placed in a newspaper (R. 149, 234), describing an automatic machine, stating that factory distributors or others would secure locations; that $200 to $400 earnings per week were possible, and that the business was to be established immediately. After the purchaser answered the ad-

vertisement, an appointment was made in a good room in a leading hotel (R. 57). The salesman, who had been given explicit instruction in selling technique, determined how much money the prospect could furnish (R. 58; see, *e. g.*, R. 576–594) and made various representations as to the product (R. 528–532, 569–576). The purchaser signed a contract (R. 85, 157, 703) and the salesman secured a check which was immediately cashed (R. 62, 750). Eventually the purchaser received the product.

Actually the machines were not automatic (R. 286) and no one returned to help install the machines (R. 363). Although ads indicated the business was to start immediately, such items as coffee vendors, for which ads appeared as early as January 1952 (R. 362), were not even built until June 1952 (R. 617, 641; see R. 167–189). Although promised profits ranged from $400 per month (R. 83) to $200 to $400 per week for part time work (R. 149), not one of the 59 witnesses testified to grossing sufficient to cover costs. (See, *e. g.*, R. 705–706; R. 165.)

The evidence disclosed that petitioner Leo Peter Reistroffer organized, was in charge of the office and, on occasion, sold for National Advanced Vending Co. (R. 51–53), one of the selling companies. He and petitioner W. L. Rogers were partners in, and organized, Advanced Advertising Associates (R. 700) which was later run by Violet E. Sheean, sister-in-law of Reistroffer (R. 51, 77) and which placed ads for National Advanced Vending Co. and later for Continental Merchandising Corp. (R. 600–601, 645, 681–684). W. L. Rogers was National Sales Director

(R. 133, 661) and also sold as a distributor (R. 362). Continental Merchandising Corporation was organized in 1952 (R. 51, 52, 78). Although others appeared to control that corporation, Rogers was in practical control because he had a contract with the corporation through which he exercised full control of the salesmen, had exclusive rights to decide what products would be sold and received two-thirds of the gross profits (R. 677–680). Reistroffer was regularly in the office of Continental Merchandising Corporation where he was consulted about problems (R. 676) and also sold for the corporation, using the name Randell (R. 78, 680). Petitioner Marvin Norris was identified as a salesman for National Advanced Vending Co. (R. 204, 206, 212, 508, 513, 579) and identified in the Continental Merchandising Corporation office (R. 683).

Part of the alleged scheme was the transfer of activities, and concealment thereof, between National Advanced Vending Company and Continental Merchandising Corporation (R. 5, par. 14). In September, 1952, both Rogers and Reistroffer attended a meeting where stock of Continental was transferred to a Martin Underwood (R. 675), although, as noted *supra*, Rogers retained control of the corporation. On that same date Rogers told Underwood that it was his (Rogers) job to worry about the salesmen (R. 675). From September on, Reistroffer was consulted about Continental Merchandising Corporation problems from time to time (R. 682).

On December 17, 1952, James T. Nelson, postal inspector, interviewed Reistroffer about the activities of

National Advanced Vending Company (R. 657–658) and Reistroffer was asked whether he had anything to do with Continental Merchandising Corporation. He replied "they are competitors" (R. 663). Reistroffer also wrote inspector Nelson a letter dated December 22, 1952 (R. 664), in which he stated he was quitting the vending machine business (R. 668).

ARGUMENT

The questions raised by petitioners largely involve issues as to the admissibility of evidence and instructions to the jury which relate to the particular factual situation of this case. No question of general importance nor conflict among the circuits is presented and there is no occasion for further review by this Court.

1. Petitioners argue (Pet. 11–13) that, before each purchaser was allowed to testify to the sales talk given him and the letters sent to him, the jury should have been instructed, as requested, that statements made by one defendant would not be binding on others unless a common plan was proved. The trial court early made inquiry as to whether evidence which was otherwise hearsay as to some petitioners would be connected, and upon being assured that it would be, allowed the evidence to come in subject to a later determination of its ultimate impact (R. 82, 83, 95, 96). In the instruction, to which no objection was taken, the jury was told (R. 932):

> In the present case the Government has presented evidence as to statements made in the absence of the different defendants. Before you may consider such evidence as to any defendant,

> you must first find that the Government has by evidence apart from such statements established beyond a reasonable doubt (1) that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described in the Indictment, and (2) that the statement or statements were made pursuant to such scheme and in furtherance thereof.

The procedure followed here is that frequently employed in conspiracy cases. It has long been the rule that much discretion must be left to the trial judge in such matters. *Clune* v. *United States,* 159 U. S. 590. Here, if there was a scheme which involved the salesmen, the testimony of the purchasers as to what was said during the course of the scheme was admissible against all. Since there was ample direct evidence tying each petitioner to the scheme, submission of this evidence to the jury was fully justified. *Grell* v. *United States,* 112 F. 2d 861 (C. A. 8).[1]

2. Petitioners complain because the trial court refused or failed to give instructions which they label "theory of defense" (Pet. 14). Of the requested instructions listed, the court refused completely only one, that the jury be instructed that Reistroffer claimed that he made no fraudulent statements and

[1] Petitioners cite cases (Pet. 12–13) calling for limiting instructions at the time evidence is introduced where the testimony sought to be elicited has reference to events subsequent to the conspiracy and thus is known to relate only to one defendant. These cases are inapposite here where all the testimony relates to declarations or letters during the course of and in furtherance of the scheme.

did not intend to deceive (R. 848-849). Since Reistroffer did not testify, the question of his intent and whether his statements were fraudulent had to be decided from all the circumstances of the case. This was the basic issue to be decided by a jury. It was a "theory of defense"[2] only in so far as the theory of the defense was that petitioner was not guilty of the charge. The jury was told that there was a plea of not guilty and that the government had the burden of proving beyond a reasonable doubt all the elements of the crime, including intent and fraudulent statements. No further comment was required.

All other requested instructions upon which there is complaint were either given in substance or otherwise covered. Petitioners complain about refusal to instruct that the purchase order sent customers warned them not to rely on representations not contained therein (Pet. 15). However, the court indicated that it would give an instruction on the document (R. 854), and did so at the end of Instruction 9 (R. 931). Petitioners also complain about the refusal to give several instructions as to acting in good faith. Actually this was covered in Instruction 8a (R. 930). Certainly, a judge is not obligated to adopt the exact language requested, nor repeat instructions already given in substance. *Sugarman* v. *United States*, 249 U. S. 182, 185.

[2] Examples of "theories of defense" are insanity (*Tatum* v. *United States*, 190 F. 2d 612 (C. A. 10) and reliance upon someone's advice (*United States* v. *Phillips*, 217 F. 2d 435 (C. A. 7)). These call for special instructions because they relate to an affirmative defense. No such defense was asserted here.

3. Petitioners' third question purportedly presents a question of admissibility of evidence "after the completion of an alleged scheme to defraud" (Pet. 2), but its premise is not supported in the record. In December, 1952, Postal Inspector Nelson interviewed petitioner Reistroffer who said that Continental Merchandising Corporation was a competitor. Actually, Reistroffer was interested in Continental before and after this interview (R. 676, 678, 680, 747). As to the other petitioners, Rogers was identified in both National Advance Vending Company and Continental Merchandising Corporation, as was petitioner Norris.[3] Therefore this conversation was during the course of the scheme and made to cover the shift from one company to another. As such it was admissible against all participants. The Court of Appeals found that the statements made to Nelson were "* * * to prevent stop orders against using the mail. They were in furtherance of the same scheme" (Pet. 38).

4. Petitioner Reistroffer called as a defense witness the vice-president of the Silver King Corporation which built some of the products. Counsel for a defendant, not here petitioning, was not allowed to ask him leading questions although he was permitted to examine him (R. 788). The trial court indicated that, as to this friendly defense witness, other defendants

[3] Petitioners (Pet. 6 and 13) state that Norris had no connection with Continental. This does not comport with the record where he is identified in the Continenal office (R. 683). Also, there must be affirmative action to prove withdrawal from what was one continuous scheme, and there is no such testimony as to Norris. *Hyde* v. *United States*, 225 U. S. 347.

could not "under the guise of cross-examination propound leading questions" (R. 789). Petitioners argue that Rogers should have been permitted to cross-examine this witness (Pet. 18). Suffice it to note that Rogers' trial counsel neither asked nor attempted to ask any questions of this witness (R. 783–791).

Petitioners raise a similar complaint as to their right to cross-examine the only defendant (not a petitioner here) who took the stand. Actually the complaint is not as to the right to cross-examine, but solely the restriction upon leading questions (R. 827). It is well recognized that the extent of cross-examination rests largely within the sound of discretion of the trial judge. *Michelson* v. *United States,* 335 U. S. 469. Here there was a friendly witness and no occasion for leading questions.

5. The last question concerns a handwriting expert and pertains solely to petitioner Norris. One purchaser, Joe A. Diehl, identified Norris as the salesman who sold him some products. Norris was accompanied by a man called G. W. Cox (R. 579) who, at the trial, was identified as Paul Kenneth Brown (R. 577). Diehl noted there was a controversy as to which salesman's name was to be affixed to the contract (R. 591–592). He believed that Cox signed the contract (R. 580), although he did not know which one filled it in (R. 593–594).

Another purchaser, Harry Rayner, dealt with a man called Marvin Norris, who was identified at the trial as Paul Kenneth Brown (R. 203). The purchaser in substance testified that Brown signed the contract "Marvin Norris" (R. 205). A few days later when Rayner called the hotel room, a man who did not give

his name came to the lobby and told Rayner that the salesman had left and that Rayner had "the best deal in San Diego" (R. 204–206). Rayner identified this man at the trial as petitioner Marvin Norris (R. 204).

A third purchaser, L. B. Leid, was sold by Marvin Norris and another salesman whom he thought was Brown (R. 513–514). He was not given the contract (R. 515), but saw Marvin Norris sign it (Ex. BK, R. 520).

A further purchase was made by Ruth W. Dobson, who identified Marvin Norris as the person who signed her contract "G. W. Cox by Marvin Norris" (R. 508, 511–512).

Norris was also identified, again in the company of salesman Brown, in the office of Continental Merchandising Corporation (R. 683).

In rebuttal of this testimony, Norris offered two alibi witnesses to cover the period of time when he was identified as signing the Leid and Dobson contracts (R. 765, 804–805). He also offered Mrs. Dobson's attorney who stated that Marvin Norris was not the person who came to his office in connection with signing the Dobson contract (R. 764–765).

The trial had begun April 23 (R. 42). On May 3, Norris requested a subpoena at government expense for a handwriting expert from St. Louis, Missouri, to testify to the Leid and Dobson contracts (R. 568). The trial judge indicated that in his 20 years' experience he had never heard a handwriting expert testify from just looking at signatures and without a chance to test them in a laboratory. The court noted he could subpoena the expert but that he would in all

likelihood say "I am not prepared to testify" (R. 606). Trial counsel apparently agreed with this (R. 606). The trial court further noted that there would be trouble getting genuine signatures without running into conflict with the defendant's rights under the Fifth Amendment (R. 608); that the mere signature on the bond would not be sufficient for an expert who would want many varied samples (R. 609). The court stated "* * * And the record is silent on any offer—that he offered any comparable signatures * * *" (R. 900). The court denied the motion (R. 662).

Under all these circumstances, no error resulted from the refusal to subpoena a handwriting expert. First, this involved a collateral matter. Norris was not charged with signing anything (R. 1–28) nor is this an element of the offense of mail fraud. Second, this is a discretionary matter. Rule 17 (b) of Federal Rules of Criminal Procedure, *supra*, p. 3; *Crumpton* v. *United States*, 138 U. S. 361. Since Norris neither took the stand nor offered comparable handwriting samples, and in view of the belated request in the middle of a long trial, the Court of Appeals was correct in finding that "the refusal of the District Court * * * does not present such abuse of discretion and prejudice to Norris as to require reversal * * *" (Pet. 53). And finally it should be noted that Norris was placed in the scheme by others, such as Joe A. Diehl, apart from any signature evidence. Neither a handwriting witness, nor the tendered alibi witnesses, could contradict Diehl's identification.

As a further point under this question petitioner complains of the government's closing argument. Petitioner's trial counsel together with his present counsel chided the government in their closing arguments for failure to bring in scientific evidence or failure to consult a handwriting expert in connection with Norris (R. 874, 878). The government started to respond to this argument by stating that Norris could put any witness within reach of a subpoena on the stand (R. 897). However, the trial court immediately instructed the jury to disregard the argument by both sides as to handwriting experts and instructed the government not to go further (R. 897). Outside the hearing of the jury the trial court later denied a motion for mistrial (R. 900).

The argument of petitioners' counsel was not, as he contends, proper comment on failure to call a material witness since proof of handwriting was not part of the government's case. The trial court acted correctly in instructing the jury to disregard the argument of both sides on this issue. In view of his prompt instructions when the government started to answer petitioners' argument, the claim of prejudice is without foundation.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 493.

LEO PETER REISTROFFER,
Petitioner,
v.
UNITED STATES OF AMERICA.

MOTION

For Leave to File and Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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For Leave to File and Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

(a) MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Petitioner Reistroffer respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 12, 1959. Rehearing is sought at this time because this Court on June 15, 1959, decided

Marshall v. United States, No. 383, October Term, 1958, which case, as is pointed out more fully in the annexed petition, contains a similar question to that presented by petitioner to the Court of Appeals in seeking reversal of his conviction in the District Court. The Marshall case decided that where jurors had read newspaper articles referring to the defendant as an ex-convict, the trial Court erred in refusing to declare a mistrial, notwithstanding the jurors' statements that they would not be influenced by such articles and could decide the case only on the evidence presented. Reference to petitioner Reistroffer as an ex-convict was made by a Government witness in the trial in the District Court, although said petitioner did not testify in his own behalf.

Although this petition for rehearing is filed after the expiration of the time prescribed by Rule 58, the grounds upon which it is based arose after such time. The Court clearly has power, in its discretion, to entertain the petition. **Zap v. United States**, 330 U. S. 800; **Stone v. White**, 300 U. S. 643.

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(b) PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner Reistroffer prays that this Court grant rehearing of its order of January 12, 1959, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition filed herein on November 5, 1958.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT.

At the time of the filing herein of the petition for a writ of certiorari and at the time of this Court's denial of such petition on January 12, 1959, this Court had not decided **Marshall v. United States**, No. 383, October Term, 1958. The **Marshall** case was decided on June 15, 1959. It is the contention of petitioner that the **Marshall** case contained an issue very similar to one in the instant case, and that that issue was the basis of this Court's reversal of the conviction in the **Marshall** case.

In **Marshall**, the defendant was charged with an illegal dispensing of dextro amphetamine sulfate tablets. He did not take the stand in his own behalf. During the trial certain newspaper articles appeared, in which reference was made to two prior felony convictions of the defendant, one for forgery and one for practicing medicine without a license. Seven of the jurors read the articles, but stated that they would not be influenced thereby, and that they would decide the case only on the evidence and without prejudice. Notwithstanding such statements of the jurors and notwithstanding the trial Court's large discretion in ruling on such an issue, this Court held:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence . . . It may indeed be greater for it is then not tempered by protective procedures . . .
>
> "In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts . . . we think a new trial should be granted."

In the instant case, the following situation occurred during the trial. During the testimony of Government witness Harry Rayner (R. 203) while the Government was presenting its evidence in chief, the witness stated that he talked on the telephone to the defendant Reistroffer, and said to him ". . . you are nothing but a damn ex-convict" (R. 209-210). An immediate request for a mistrial was made by the defense counsel, but this request was denied by the Court, although the jury was instructed to disregard the witness' statement (R. 210). Defendant Reistroffer did not testify in his own behalf.

We believe that the foregoing statement of witness Rayner was equally if not more prejudicial to the petitioners herein as the newspaper articles in the **Marshall** case. Here, just as there, the jurors were exposed to information which the Government could not properly introduce in evidence as part of the Government's case in chief. It would seem that such evidence heard in the Courtroom would be even more prejudicial in the minds of the jurors than articles read by them in newspapers during a court recess. The poison and prejudice thereby resulting could not be eradicated by the trial Court's mere statement to the jury to disregard such testimony. The jury thereby knew once and for all that defendant Reistroffer was an ex-convict, and this knowlege certainly was held by them throughout the trial and could not be erased from their minds. Under such circumstances, the decision of this Court in **Marshall** should certainly control disposition of this case, and certiorari should be granted so that this Court may examine the facts in this case pertinent to this issue in the light of its decision in the **Marshall** case.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of cer-

tiorari be issued to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....
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.....
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